

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

NORTHWEST AQUATIC ECOSYSTEMS,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent,

v.

WASHINGTON TOXICS COALITION,

Intervenor.

PCHB NOS. 05-087, 05-088

ORDER GRANTING SUMMARY
JUDGMENT

Appellant Northwest Aquatic Ecosystems (Northwest Aquatic) is challenging NPDES general permit coverage denials issued by the Washington Department of Ecology (Ecology) to Seattle Yacht Club (PCHB No. 05-087) and Queen City Yacht Club (PCHB No. 05-088). The Washington Toxics Coalition (WTC) has been granted status as an intervenor by prior order of the Board. Ecology has moved for summary judgment dismissing the Northwest Aquatic appeals.

In considering this motion the Board, comprised of Bill Clarke and William H. Lynch, reviewed the following:

1. Ecology's Motion for Summary Judgment and Memorandum.
2. Declaration of Ronald L. Lavigne in Support with attachments.

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1 3. Northwest Aquatic Eco-Systems Reply to Ecology's Motion.

2 4. Ecology's Reply.

3 The matter was decided on the record without oral argument. Based upon the records and
4 files in the case and the evidence submitted, the Board enters the following decision.

5 Facts

6 Northwest Aquatic Ecosystems applied to Ecology for coverage under the Aquatic
7 Nuisance Plant and Algae Control National Pollutant Discharge Elimination System (NPDES)
8 Waste Discharge General Permit (Nuisance Permit) to allow pesticide applications in Portage
9 Bay at the Seattle Yacht Club and the Queen City Yacht Club. Portage Bay is a fresh water body
10 located between Lake Washington and Lake Union. The applications were filed on May 4, 2005,
11 and May 24, 2005, respectively. Ecology denied coverage for both entities by letter dated June
12 2, 2005.

13 Both the Seattle Yacht Club and Queen City Yacht Club sites have been treated twice
14 within the current five year general permit cycle for noxious weed control. Neither facility has
15 ever been treated specifically for nuisance weeds. A draft Integrated Aquatic Vegetation
16 Management Plan (IAVMP) was prepared for the two clubs and submitted to Ecology in March
17 2005. The draft plan identified the primary issues in Portage Bay as Eurasian water milfoil and
18 Brazilian elodea, both recognized as noxious weeds. At the time of the applications in question,
19 Ecology had not approved the IAVMP. The pesticide proposed for use in Portage Bay is
20 considered a non-selective chemical, which would most likely control both noxious and nuisance
21 weeds in the application area.

1 Ecology denied coverage under the Nuisance Permit on the basis that coverage had
2 already been obtained for two years under the noxious weed permit without an approved
3 IAVMP. Ecology considered the applications an effort to avoid the requirement to obtain
4 approval of an IAVMP prior to additional noxious aquatic weed pesticide applications. Ecology
5 further indicated the dominant species in the proposed treatment area were noxious weeds rather
6 than nuisance weeds. Northwest Aquatic does not challenge this assertion by Ecology. Ecology
7 concluded the proper permit for control activity would be the noxious weed general permit.

8 Analysis

9 Ecology argues that the Board can only overturn Ecology's decision to grant or deny
10 coverage under the NPDES general permit program if the agency's decision is an abuse of
11 discretion. This contention misstates the applicable standard of review and ignores long-
12 standing precedent. The Pollution Control Hearings Board reviews decisions of the Department
13 of Ecology on a *de novo* basis in adversary proceedings. *Protan Laboratories, Inc. v. Ecology*,
14 PCHB No. 86-20 (1986). The standard of review for a NPDES appeal was recently enunciated
15 by the Board in a NPDES permit appeal in *Port of Seattle v. Ecology, ACC, CASE and Puget*
16 *Soundkeeper Alliance*, PCHB Nos. 03-140, 03-141, 03-142 (2004):

17 The burden of proof is upon the appealing party(s) as to each of the legal
18 issues in the case and the Board considers the matter *de novo* giving
19 deference to Ecology's expertise as the administering agency for NPDES
20 permits. *Port of Seattle, v. Pollution Control Hearings Board*, 151
21 Wn.2d 568, 90 P.3d 659 (2004). Pursuant to WAC 371-08-540(2), 'In
those cases where the board determines that the department issued a
permit that is invalid in any respect, the board shall order the department
to reissue the permit as directed by the board and consistent with all
applicable statutes and guidelines of the state and federal governments.'

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2 *Port of Seattle*, PCHB Nos. 03-140, 03-141, 03-142 at Conclusion of Law 1.

3 The Pollution Control Hearings Board has long held that the abuse of discretion standard
4 is inapplicable to its appeals. The Board engaged in a detailed analysis of the issue in *Yakama*
5 *Indian Nation v. Ecology, Golden Gate Ranches, Inc., et al.* PCHB Nos. 93-157, 93-166-93-168,
6 93-173-93-177, 93-205-93-212, 93-215-93-22, 97-117 and 97-118. (Order on Motions for
7 Summary Judgment, October 9, 1998). The *Yakama* case involved an Ecology water rights
8 decision, but the standard of review for an NPDES permit is no different:

9 The motions suggest that the Board should employ an abuse of discretion
10 standard in reviewing Ecology's water right permit decisions. While the
11 standard of review argument is not directly related to the dismissal
12 requested in this motion, the Board has previously and consistently held
13 that the standard for Board review of Ecology decisions is "de novo".
See WAC 371-08-183. The issue was comprehensively addressed in
14 *Fleming, Paulson and Clark v. Ecology and Zylstra*, PCHB Nos. 93-320,
15 94-7 and 94-11 (1994):

16 The standard of review applied by the PCHB in the area of water
17 rights is both procedurally and substantively de novo. WAC 371-08-
18 183. The PCHB was created by the legislature to provide independent
19 expert and uniform adjudication of actions by the Department of
20 Ecology. RCW 43.21B.010. The independent role and expertise of the
21 board has been recognized on numerous occasions by our courts.
ASARCO v. Air Quality Coalition, 92 Wn.2d 685, 695 (1979); *Seattle v.*
Department of Ecology, 37 Wn.App. 819, 823 (1984). The board cannot
fulfill its independent role unless it has the opportunity to develop its
own factual record. Likewise, the board would be unable to provide an
independent review without a substantive de novo standard of review.
An 'abuse of discretion' or other deferential standard of review would
violate the legislature's directive that the PCHB provide the procedural
safeguard of a full, expert, independent adjudication of environmental
controversies.

1 Respondents improperly cite *Ecology v. Bureau of Reclamation*, 118
2 Wn. 2d 761, 767 (1992); and *Schuh v. Department of Ecology*, 100
3 Wn.2d 180, 183-84 (1983), for the proposition that the standard of
4 review applicable to this case should [be] abuse of discretion. To the
5 extent that those opinions recognize broad discretion by Ecology
6 concerning the approval of water rights permits, that discretion is also
7 lodged in the PCHB which has exclusive jurisdiction to conduct
8 administrative adjudicative proceedings relating to the grant or denial of
9 water right permits. RCW 43.21B.110(1)(c). Neither *Bureau of*
10 *Reclamation* nor *Schuh* address the standard of review applicable to an
11 administrative appeal to the PCHB. *Fleming, et al.* PCHB 90-320 at 6-7.

12 The Board's historically recognized *de novo* standard of review as recently analyzed and upheld
13 by the Washington Supreme Court in *Port of Seattle v. Pollution Control Hearings Board*, 151
14 Wn.2d 568, 591-59, 90 P.3d 659 (2004):

15 In accordance with long-standing precedent and the Washington Supreme Court's recent
16 analysis the Board reviews this matter *de novo* giving due deference to Ecology's expertise as
17 the administering agency for the NPDES permit program. Northwest Aquatics, the appealing
18 party, has the burden of proof.

19 Ecology asserts the provisions of the Nuisance Permit preclude coverage in the current
20 case, because the predominant weeds in Portage Bay are noxious weeds. Condition S2 of the
21 Nuisance Permit provides:

Applications under this permit shall be primarily for the control of
nuisance plants, nuisance plants near surface waters, algae, and for
noxious aquatic plants which may be incidentally impacted in the course
of treating for nuisance plants. A separate permit covers control of listed
noxious aquatic weeds and weeds on the quarantine list in aquatic
environments.

1 Permit No. WAG – 994000, Condition S2. While the application forms indicates the proposed
2 use of pesticides is to treat nuisance weeds, the evidence indicates the predominant species in the
3 area are noxious weeds. Given the far larger number of noxious weeds than nuisance weeds, the
4 permit application is out of compliance with the terms of Condition S2. The evidence before the
5 Board indicates the treatment proposed would not be “primarily” for the control of nuisance
6 weeds. Noxious weeds would be the primary plants impacted by the treatment. Accordingly,
7 coverage under the Nuisance Permit is unwarranted under Condition S2 and Ecology’s decision
8 to deny coverage was correct.¹

9 ORDER

10 Based upon the foregoing analysis, the Board grants summary judgment to Ecology. The
11 appeals in PCHB No. 05-087 and 05-088 are hereby DISMISSED.

12 Dated this 16th day of December 2005.

13 POLLUTION CONTROL HEARINGS BOARD

14 BILL CLARKE, CHAIR

15 WILLIAM H. LYNCH, MEMBER

16 Phyllis K. Macleod
17 Administrative Appeals Judge
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19

20 ¹ Ecology argued that the applications were an improper attempt to avoid the requirement to obtain approval of an
21 IAVMP before the third treatment within the five year permit cycle. The evidence does not support this allegation,
particularly since a draft IAVMP had been submitted to Ecology on behalf of the yacht clubs two months prior to
the coverage applications.